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14

15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 DANA GOLD, TAMMY EMERY, EDWIN
MENDEZ, LAURA NORRIS, DONALD
FURSMAN, and JOHN TRIANA, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.
20 LUMBER LIQUIDATORS, INC., a
Delaware corporation; and DOES1 through
21 200, inclusive,

Defendant.

Case No. 3:14-cv-05373-TEH

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANT LUMBER
LIQUIDATORS' MOTION TO
EXCLUDE PLAINTIFFS' EXPERT
WITNESSES**

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1 **I. INTRODUCTION**

2 Plaintiffs respectfully request that the Court deny the Lumber Liquidators Inc. (“Lumber”
 3 or “Defendant”) motion to exclude Plaintiffs’ expert witnesses, Emily Hopps, Peter Nelson,
 4 Daniel Harrington and Phillip Waier and any related deposition testimony.

5 Engineers Peter Nelson and Emily Hopps of Simpson, Gumpertz, & Heger (SGH) opine
 6 that Morning Star strand bamboo made at different plants and sold since 2008 is (1) defective
 7 (will excessively shrink and expand) when subjected to reasonable ranges of relative humidity
 8 causing the locking mechanisms of Morning Star to become loose or break, (2) unable to last 30-
 9 years as represented, and (3) sold with inadequate installation instructions.

10 Defendant does not attempt to refute the damaging conclusions of SGH’s Report, which
 11 [REDACTED], nor does it attempt
 12 to question the qualifications of the experts conducting the study. Defendant instead argues the
 13 sample size was inadequate, the testing methodology improper, and the consumer complaint data
 14 base analysis incorrect. Lumber never provides any evidence as to what sample size would be
 15 adequate and never tells the Court that it uses a similar, if not smaller, sample size when
 16 evaluating Morning Star. Tellingly, Defendant’s experts performed no testing of their own.
 17 SGH’s testing methodology is consistent with approved standards and conduct by very
 18 experienced experts. Again, Defendant’s own testing methodologies used for its product are not
 19 remotely as thorough as Plaintiffs employed. If there is a dispute concerning who is correct
 20 about the details of the testing methodologies, the forum for resolution is trial—not expert
 21 exclusion. Also, Lumber’s criticism of its own data base performed by SGH is an issue best left
 22 to trial resolution. Reasonable experts can differ. Determining which is “correct” is an issue for
 23 the finder of fact.

24 Plaintiffs’ expert Daniel Harrington offers the simple and singular opinion that in
 25 virtually every case, Morning Star flooring will need to all be removed, not just one board.
 26 Defendant, ignoring Mr. Harrington’s years of experience in evaluating bamboo flooring claims,
 27 argues that he must inspect a bamboo floor to be an expert, not just teach bamboo flooring
 28 inspection classes to inspectors who seek certification, or be the source they turn to for complex

1 bamboo flooring inspection and performance issues.

2 Phillip Waier, of R.S. Means, provides a damage calculation model similar to those he
 3 has proffered at trial in other building product class action cases. The formula is not terribly
 4 complex. There are only a few moving parts. The old floor comes out, the new floor gets
 5 installed. The damage model has essentially three variables. The cost of removing the floor, the
 6 cost of the new floor product, and the labor cost for doing both. That's it. The cost of removing
 7 flooring is known, and it makes virtually no difference whether it is bamboo or hardwood. R.S.
 8 Means collects data nationally and can apply that data regionally also. The cost of new floor is
 9 also readily obtainable. As easily as Lumber's customers calculate the cost of flooring by
 10 internet research on flooring websites. And labor costs are for installing a wood or bamboo floor
 11 are nationally and regionally collected by R.S. Means. That is their unique expertise. They do
 12 not define the repair, only the cost of performing it.

13 Each of the experts opinions are based upon methodologies and experience that more
 14 than meet the standard for reliable opinion testimony under Fed. R. Evid. 702, and *Daubert v.*
 15 *Merrell Dow Pharms.*, 509 U.S. 579 (1993). The criticisms offered by Lumber go to the weight
 16 of the evidence, not its admissibility. Nothing precludes Lumber or its experts from challenging
 17 Plaintiffs expert evidence at summary judgment or trial. Lumber's motion should be denied.

18 **II. ARGUMENT**

19 **A. Standard of Review**

20 The trial court has wide discretion to act as a gatekeeper for the admissibility of expert
 21 testimony. *Kumho Tire Co v. Carmichael*, 526 U.S. 137, 151-52 (1999). A party may introduce
 22 expert testimony if the expert is properly qualified, the testimony is based upon sufficient facts
 23 or data, the testimony is the product of reliable principals and methods, and the witness has
 24 applied the principles and methods reliably to the facts of the case. *See Primiano v. Cook*, 598
 25 F. 3d. 558, 564 (9th Cir. 2010) (citing Fed. R. Evid. 702) Expert opinions are relevant if the
 26 knowledge underlying them has a " valid connection to the pertinent inquiry." *United States v.*
 27 *Sandoval-Mendoza*, 472 F. 3d 645, 654 (9th Cir. 2006) (internal quotation marks and alteration
 28 omitted). Opinions based upon customs, practices, or experience are relevant if expert witnesses

1 describe their relevant background and explain how that background informed their opinions.
 2 See, e.g. *Den norske Bank AS v. First Nat'l. Bank*, 75 F. 3d 49, 57-58 (1st Cir. 1996) (permitting
 3 a banking executive who had worked in banking for forty years to testify about the industry
 4 custom to allow minority-participant vetoes); *Ji v. Bose Corp.*, 538 F. Supp.2d 354 (D. Mass.
 5 2008) (allowing a casting director for photo shoots to testify about custom and practices in the
 6 modeling industry relative to photographer rights)

7 The trial court's task is not to "decid[e] whether the expert is right or wrong, just whether
 8 his testimony has substance that would be helpful to a jury." *Alaska Rent-A-Car, Inc. v. Avis*
 9 *Budget Group, Inc.*, 738 F.3d 960-70 (9th Cir. 2013). Courts may not exclude testimony simply
 10 because it is impeachable. *Id.* at 969. "Shaky but admissible evidence is to be attacked by cross-
 11 examination, contrary evidence and attention to the burden of proof, not exclusion." *Primiano*,
 12 598 F.3d. at 564 (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 596 (1993)).

13 **B. Experts Peter Nelson and Emily Hopps of SGH Should Be Admitted**

14 Lumber's contention that experts Peter Nelson and Emily Hopps' ("SGH") report is
 15 unreliable is infirm and factually baseless. Lumber only challenges SGH's sample lot selection
 16 and applied methodology. It makes no effort whatsoever to refute SGH's main findings that

17 [REDACTED]
 18 [REDACTED] [REDACTED]
 19 [REDACTED] [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 _____
 26
 27 1 [REDACTED]
 28 [REDACTED]

² All Exhibits are attached to the accompanying declaration of Jeffrey Cereghino.

1 [REDACTED]
 2 [REDACTED] [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 **1. SGH is Qualified and Has Specialized Expertise**

6 Lumber has not directly challenged SGH's qualifications to serve as experts in this
 7 litigation, and those qualifications are amply demonstrated by the record. In addition to being an
 8 engineer licensed in thirty-six states, Mr. Nelson has nearly 40 years of experience in building-
 9 envelope systems, including over a dozen floor investigations, presentations and publications.
 10 Ms. Hopps, who is an engineer in six states, has been with SGH for 13 years and leads its
 11 flooring practice (which includes design, failure investigation and repair). SGH's knowledge,
 12 experience, qualifications, and skill are unquestioned. *See LG Elecs. U.S.A., Inc. v. Whirlpool*
 13 *Corp.*, No. 08 C 242, 2010 WL 3397358, at *2 (N.D. Ill. Aug. 24, 2010) (citing Advisory
 14 Committee Notes to Rule 702) ("In certain fields, experience is the predominant, if not the sole
 15 basis for a great deal of reliable expert testimony.").

16 **2. SGH's Analysis of the Samples Is Reliable.**

17 SGH's Samples were sufficient, are what Lumber called for, and were representative.

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 In assessing admissibility of expert opinions, it is important to note that the role of the
 23 trial court is to eliminate "unreliable nonsense opinions, but not exclude opinions merely

24 _____

25 3 [REDACTED] [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 because they are impeachable.” *Alaska Rent-A-Car*, 738 F.3d at 969. The Ninth Circuit has
 2 described the appropriate inquiry as follows: “The district court is not tasked with deciding
 3 whether the expert is right or wrong, just whether his testimony has substance such that it would
 4 be helpful [.]” *Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th
 5 Cir.2014) (citing *Alaska Rent-A-Car*, 738 F.3d at 969). Thus, “the critical inquiry remains
 6 whether there is evidence of unreliability... in a particular case; there is no per se rule regarding
 7 sample size...” *US v. Sleigh*, 2015 WL 3866270 at *2 (N.D. Cal. June 22, 2015).

8 Lumber’s suggestion that the 177 samples selected by SGH were improper is misguided.

9 See Brief at pp. 18-20. [REDACTED]
 10 [REDACTED]
 11 [REDACTED] [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Concerning the Plaintiffs’
 15 samples, they were installed in homes located across the country (CA, PA, IL, MN, FL and WV)
 16 and ranged in dates of production (2013 to 2014) and manufacturing plants. SGH conducted
 17 visual examinations of each of the Named Plaintiffs’ floors. (Exh. 1, SGH Report at pp. 12-17.)
 18 The new store samples that were purchased from stores in MA, IL, CA, NY and the District of
 19 Columbia and range in dates of production (2014 and 2015) and manufacturing plants were
 20 never adhered to a floor or in-service at any time. SGH’s sample size was adequate and
 21 representative. “Our testing included a large enough overall sample size to demonstrate a
 22 consistent trend in expansion and contraction. (Exh. 11, Nelson Declaration a p. 2; [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 [REDACTED] Also the lot size SGH studied comports with the industry’s trade publications. (See,
 26 e.g., Arens and Baughman, Indoor Humidity and Human Health-Part 1: ASHRAE,⁴ at p. 196
 27

28 ⁴ http://www.cbe.berkeley.edu/research/pdf_files/ArensBaughman1996_Pt2.pdf

1 (citing Smith, et al. (1985) showing that different relativity humidity range testing, related to
 2 mite allergens, only required a sample set of 20 homes; citing Hart and Whitehead (1990),
 3 showing that similar testing only required a sample set of 30 homes; citing Korsgaard (1983a,
 4 1983b), showing that similar testing only required a sample set of 50 Danish apartments).

5 Lumber claims that the new samples were tested by SGH after being preserved in SGH's
 6 storage warehouse for several months and that "perhaps" damage to their "original composition"
 7 took place. (*See* Brief at p. 22.) The only reasonable takeaway from this argument is that
 8 Lumber appears to be making the stunning admission that *every* Morning Star board it made in
 9 China, shipped across the ocean in shipping containers, transported by trucks to its various stores
 10 across the country, and placed on shelves for sale since at least 2008, will have issues with its
 11 "original composition."⁵ Lumber's other claim that the newly bought samples were not tested at
 12 the same time along with the other samples is also frivolous. SGH was clear during its
 13 deposition that [REDACTED]

14 [REDACTED] The various samples SGH observed and
 15 forensically tested were representative and allow for inferences to be made.

16 SGH's sample selection process is entirely consistent with that which Lumber itself
 17 employs as representative and adequate samples:

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

27 ⁵ Plaintiffs invite Lumber to further explain what issues Morning Star's "original
 28 composition" will suffer when it is subjected to the path-to-sale sequencing described here.

29 ⁶ *See* <http://www.lumberliquidators.com/l/c/Golden-Zebra-Strand-Bamboo-Morning->
 Star-PRBAMSTZ/10015285 (last visited Apr. 19, 2017) (showing Article # 10015285 to be

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As illustrated, SGH followed a similar sampling process and practices that Lumber does. Thus, Lumber's attempt to claim the sampling process was unrepresentative should be rejected.

3. SGH's Methodology is Accepted and Reliable.

Unable to refute SGH's damaging testing results, Lumber devotes its attention to challenging SGH methodology.

In the Ninth Circuit... expert evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*. The rationale of this approach is that [a] minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method does not render expert testimony inadmissible.

City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1047–48 (9th Cir. 2014) (internal quotation marks and citations omitted).

Again, the purpose of the district court's inquiry is “to screen the jury from unreliable nonsense opinions” and not to “exclude opinions merely because they are impeachable.” *Alaska Rent-A-Car*, 738 F.3d at 969. In so doing, the district court functions as a “gatekeeper, not a fact finder.” *Primiano*, 598 F.3d at 565 (internal quotations omitted). “Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.” *Id.* at 564 (citation omitted).

Morning Star 5/8" x 3-3/4" Golden Zebra Strand Bamboo).

1
2 The test of reliability is flexible... The court must assess the expert's reasoning or
3 methodology, using as appropriate criteria such as testability, publication in peer-
4 reviewed literature, known or potential error rate, and general acceptance... But these
5 factors are meant to be helpful, not definitive, and the trial court has discretion to decide
6 how to test an expert's reliability as well as whether the testimony is reliable, based on
7 the particular circumstances of the particular case. The test is not the correctness of the
8 expert's conclusions but the soundness of his methodology, and when an expert meets the
9 threshold established by Rule 702, the expert may testify and the fact finder decides how
10 much weight to give that testimony... Challenges that go to the weight of the evidence
11 are within the province of a fact finder, not a trial court judge. A district court should not
12 make credibility determinations that are reserved for the jury.

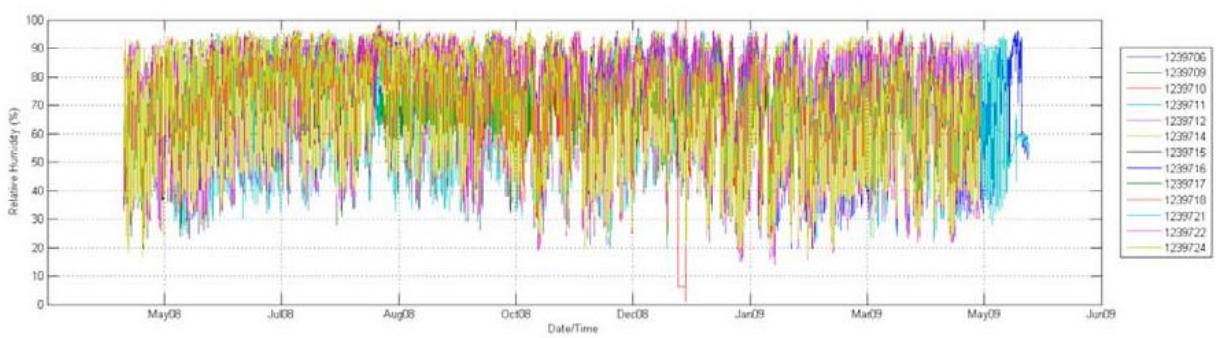
13
14 *City of Pomona*, 750 F.3d at 1044 (internal citations and quotation marks omitted); Here,
15 Lumber's entire argument is simply a rebuttal of SGH's conclusions, asking the Court to step
16 into the fact-finder role. The Court must decline to do so.

17
18 **4. SGH Conditioned Morning Star Using Relative Humidity Ranges Commonly
19 Cited in Studies and as Recommended by Lumber.**

20 When engineers conduct investigations, they investigate and test until they reach an
21 ultimate conclusion. Once the engineer is satisfied that he or she has reached the appropriate
22 conclusion, the investigation is over. (*See generally*, Billy Vaughn Koen, Definition of the
23 Engineering Method (Amer. Soc. Of Eng. Edu. 1985).) Following this principle,

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28 The ranges tested by SGH are common. For instance, the 2017 American Society of Heating, Refrigerating and Air-Conditioning Engineers (“ASHRAE”) Handbooks set standards of: (1) museums, libraries and archives at a relative

1 humidity (“RH”)% of 40-60%; (2) natatorium (recreational) at a RH % of 50-60; and (3) health
 2 care facilities at a RH % of 20-60%. (Exh. 1, SGH Report at pp. 10-11.) “The range of 25
 3 percent to 60 percent is typically defined as the comfort range.” (Building Science Corp.,
 4 *Relative Humidity*, J. Lstiburek, Apr. 23, 2002.) According to a 2010 study by the U.S.
 5 Department of Housing and Urban Development (HUD) that monitored relative humidity rates
 6 using a sample of sixty homes, the range was as follows for three distinct regions observed: the
 7 Southwest ranged between 47 to 56%; the wet Northwest region ranged between 36 to 57%; and
 8 the cold Northeast ranged between 48 to 60%.
 9 (<https://www.huduser.gov/Publications/pdf/InternalMoistureLoad.pdf>, at pp. 12-13 (last
 10 accessed Apr. 21, 2017)⁷). A table in the HUD Report, p. 19 (Fig. 5), charting the RH in the
 11 Southwest during 2008 to 2009, shows the RH was over 90% and under 30% habitually:



18 See also Arens and Baughman, Indoor Humidity and Human Health-Part 1: ASHRAE, at p. 193
 19 (commenting that values set for the upper limits have typically ranged from 60% to 80%)⁸;
 20 Energy Center of Wisconsin, Field Study of Ventilation in New Wisconsin Homes, Jan. 2003, p.
 21 26 (“we consider 30 to 40 percent relative humidity to be the appropriate target zone for
 22 Wisconsin”); PATH, Building Moisture and Durability, HUD, Oct. 2004, at p. 11 (commenting
 23 that “[r]ecently recommendations have been published calling for RH as low as 15% in very
 24

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 26 ⁷ See Exh. 21.

27 ⁸ http://www.cbe.berkeley.edu/research/pdf_files/ArensBaughman1996_Pt2.pdf (last
 28 visited Apr. 24, 2017).

⁹ <https://seventhwave.org/sites/default/files/216-1.pdf> (last visited Apr. 24, 2017).

1 cold climates").¹⁰)

2 Pointedly, Lumber never tested Morning Star's humidity stability even though it knew

3 that [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 **5. SGH Testing the Samples Using Accepted Lab Test Methods.**

11 On a weekly basis, SGH [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED] [REDACTED]

17 [REDACTED]

18 Lumber's claims that SGH misapplied ASTM by [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] [REDACTED]

22 [REDACTED]

23 [REDACTED] [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 _____

28 ¹⁰ <https://www.huduser.gov/Publications/pdf/BuildingMoistureandDurability.pdf> (last visited Apr. 24, 2017).

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] [REDACTED]
 7 [REDACTED]

8 According the Ninth Circuit:

9 “[E]xpert evidence is inadmissible where the analysis ‘is the result of a faulty
 10 methodology or theory as opposed to imperfect execution of laboratory techniques
 11 whose theoretical foundation is sufficiently accepted in the *1048 scientific
 12 community to pass muster under *Daubert*’...The rationale of this approach is that
 13 ‘[a] minor flaw in an expert’s reasoning or **a slight modification of an otherwise**
 14 **reliable method’ does not render expert testimony inadmissible.** *Amorgianos v.*
 15 *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir.2002). A more measured
 16 approach to an expert’s adherence to methodological protocol is consistent with the
 17 spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on
 18 the role of the fact finder in assessing and weighing the evidence. *Daubert*, 509 U.S.
 19 at 594–95, 113 S.Ct. 2786.”

20 *City of Pomona* 750 F.3d at 1047–48 (citations omitted) (emphasis added). [REDACTED]

21 [REDACTED]
 22 [REDACTED] [REDACTED]
 23 [REDACTED] [REDACTED]
 24 [REDACTED]

25 **6. SGH’s Test Methods Replicate Common Environments.**

26 Lumber contends that SGH’s evaluation of Morning Star subjected [REDACTED]

27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] [REDACTED] [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED] [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] [REDACTED]
 9 [REDACTED] SGH's familiarity with properties and dimensions of
 10 installed and non-installed Morning Star is vast, as it visually inspected dozens of the boards at
 11 the Warehouse in Toana, Virginia and the Named Plaintiffs' flooring.

12 **4. SGH's Analysis Allowed for Inference and Extrapolation.**

13 SGH was able to make inferences and extrapolate from its results to the population and it
 14 is true that “[t]rained experts commonly extrapolate from existing data” where, like here, there is
 15 no “too great an analytical gap between the date and the opinion.” *General Elec. Co. v. Joiner*,
 16 522 U.S. 136, 146 (2007).¹¹ [REDACTED]
 17 [REDACTED]
 18 [REDACTED] (Plaintiffs' Class Cert.
 19 Brief, p. 3.)

20 *Second*, its lab's sampling and methods were reliable and valid. [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] [REDACTED] [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED] [REDACTED]
 27 _____

28 ¹¹ Tellingly, none of Lumber's three experts conducted any forensic testing of Morning
 Star for the purposes of their reports.

1 [REDACTED]
2 [REDACTED] "In
3 science, 'reliability' refers to reproducibility of results." (David H. Kaye & David Freeman,
4 Reference Guide on Statistics in Reference Manual on Scientific Evidence at p. 102 (Fed.
5 Judicial Ctr. 2d ed. 2000).)

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] "A valid
9 measuring instrument measures what it is supposed to." David H. Kaye & David Freeman,
10 Reference Guide on Statistics in Reference Manual on Scientific Evidence at p. 103 (Fed.
11 Judicial Ctr. 2d ed. 2000.).

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] In an effort
17 to minimize the Database's utility, Lumber contends, that its Database is not "actual evidence"
18 and merely generic in nature. (See Brief at pp. 22-24.) Lumber's argument rests on a profound
19 misunderstanding of its own Database. [REDACTED]

20 [REDACTED] [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Instead of acknowledging that it utilizes the Database to organize the thousands of
6 Morning Star complaints it receives [REDACTED], Lumber
7 refers to the information, as “garbage.” (See Brief at p. 24.) Referring to the contents of its
8 Customer Complaint Database as “garbage” is curious. Further, Lumber’s attacks that SGH
9 double counted entries contained in the Database were concretely refuted by Ms. Hopps, who
10 testified that [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 As illustrated here, the evidence and testing results contained in SGH’s Report allow for
20 reasonable inferences to be made that may be extrapolated to the entire population of Morning
21 Star. *See e.g. Obrey v. Johnson*, 400 F.3d 691, 697 (9th Cir. 2005) (because challenges to
22 statistical study “went to weight and sufficiency rather than admissibility” of evidence, “the
23 district court abused its discretion when it excluded this evidence”); *US v. Sleugh*, 2015 WL
24 3866270, at *2-3 (N.D. Cal. June 22, 2015) (where defendant failed to provide authority that a
25 small sample size is inherently unreliable the court found no need to even hold a *Daubert*
26 hearing on the proposed experts’ qualifications); *Solar Sun Rings, Inc. v. Secard Pools*, 2016
27 WL 6138294, *4 (C.D. Cal. Jan. 20, 2016) (“Downey’s survey may indeed be technically
28 lacking. For example, his sample size is limited and it is not entirely clear how he derives his

1 estimates from the data he provides. At this stage, however, those technical deficiencies do not
 2 support excluding his testimony altogether... Moreover, the Court is unpersuaded that
 3 Downey's opinion must be excluded because he drew his conclusions from a relatively small
 4 sample size.”).

5. SGH is Qualified to Testify About Litigation Materials it Reviewed.

6 Lumber' final salvo is to seek exclusion of SGH from offering any opinions about the
 7 damaging Lumber internal documents and other litigation materials it observed. Contrary to
 8 Lumber' claim, Brief at pp. 24-25, [REDACTED]

9 [REDACTED]
 10 [REDACTED] [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] SGH's findings will be helpful to the trier of fact. SGH's opinion is both reliable
 14 and relevant to the issues here since it relied on extensive experience and Lumber' own
 15 documents in offering its opinion (that Morning Star will not last 30-years as represented, that
 16 the installation instructions are inadequate, and that the company was aware of the defects).
 17 Moreover, *Daubert* concerns the admissibility of an expert's testimony rather than the weight
 18 that testimony should carry with the trier of fact.

19. Lumber's “Low Claims Rate” Argument Is a Mirage.

20 Lumber' contention that the number of Morning Star customers' complaints are less than
 21 its sales, which attempts to imply that Plaintiffs' defect claims are insignificant, is not supported
 22 by the record and is contrary to its admissions. [REDACTED]

23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] Further, a large
 3 segment of customers simply do not make claims – which alters the claims rate Lumber seeks to
 4 portray here. For instance, customers will not make claims who: do not think it is worth the
 5 effort; are not aware of the warranty; have forgotten that they may make a claim; or believe that
 6 failures should be remedied by a third-party.

7 **C. Daniel Harrington's Testimony is Admissible**

8 Throughout its argument to exclude Mr. Harrington, Lumber refers to “standards” and
 9 “methodologies” and “peer review, all language drawn from *Daubert* and its progeny. But
 10 before any determination of whether Mr. Harrington’s opinion should be excluded based on
 11 some alleged failure, first the moving party has to provide evidence as to the “standards,” or
 12 “methodology” or “peer review.” Defendant’s brief lacks any reference to what standards exist,
 13 or what are accepted methodologies, or even if any peer review process exists. In short, Lumber
 14 fails to provide this Court with any metric to measure if Mr. Harrington opinion is “junk
 15 science” or not. Defendant’s motion should be denied without any further analysis because of
 16 the complete lack of any evidence reflecting bamboo flooring inspection standards, or
 17 methodologies, or whether any peer review exists in the bamboo industry. Defendant expects
 18 the Court to *assume* such standards exist, and then apply the assumed standards to Mr.
 19 Harrington. On this shaky basis alone, Defendant’s motion to exclude Mr. Harrington should be
 20 denied.

21 However Plaintiffs need not rely upon Defendant’s failures to overcome this motion,
 22 because Mr. Harrington is more than qualified to opine on the consequences of flooring failure.

23 Defendant begins its attack on Mr. Harrington by criticizing that he “has not inspected a
 24 single plank of Plaintiff’s flooring and has never inspected or installed any floor for
 25 compensation throughout his entire career” (See Brief at p.6.) Without offering a shred of
 26 supporting evidence, Defendant wants the Court to assume that *one must have inspected a floor*
 27 *or installed a floor to qualify as an expert.* Nowhere does Defendant provide the Court with
 28 any guidelines for what qualifies one person or another to be considered an expert in bamboo

1 flooring. But what is known is that in order to become a certified bamboo flooring inspector,
2 you have to take Mr. Harrington's course on bamboo.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 Given that the National Wood Flooring Institute (NWFA) selected Mr. Harrington to
14 teach individuals how to inspect bamboo floors, it seems unlikely that this organization would
15 select someone who did not have the expertise to teach inspectors.

16 But we do not need to rely upon the common sense supposition that the primary national
17 organization issuing inspector certificates would select the most qualified person to teach, we
18 have Defendant's attestation to Mr. Harrington's knowledge and expertise.

19 In July 2014, "Phillip" from Lumber Liquidators technical department corresponded with
20 Mr. Harrington. He asked the following question:

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 The forgoing exchange illustrates one dispositive fact: e [REDACTED]

8 [REDACTED] As

9 Phillip said, [REDACTED]

10 [REDACTED]

11 Defendant's technical personnel are not alone in recognizing Mr. Harrington's

12 qualifications, many others in the bamboo flooring universe do also.

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 Defendant is critical of Mr. Harrington's "methodology", in rendering his opinion that in

23 "virtually all cases" a defective bamboo floor needs to be replaced in its entirety. Defendant

24 argues that Mr. Harrington has "no personal experience installing, inspecting and replacing

25 bamboo floors", however that is not relevant to his opinion. His opinion is about the *failure* of

26 bamboo floors and the remedy for it.

27 Defendant's characterization of Mr. Harrington experience in observing flooring is

28 misleading. He testified as follows:

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]

10 Again, Lumber offers no evidence as to what the “methodology” might be with regard to
 11 remediating failed bamboo floors---or even whether any exists. Mr. Harrington’s experience
 12 more than qualifies him to opine on how to remediate failed bamboo flooring.

13 Defendant attacks Mr. Harrington’s experience in reviewing bamboo flooring claims,
 14 without offering any metric to gauge his experience. He testified he had “[REDACTED]”
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 At the core of Defendant’s motion is the unsupported assumption that the bamboo
 22 flooring industry is deeply rooted in some level of scientific framework. That assumption is
 23 simply not true. As Mr. Harrington testified:

24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 Defendant offers no contrary evidence.

11 Defendant's attempts to diminish Mr. Harrington's published articles on bamboo

12 flooring---the same one their own employee found very informative -- by suggesting the articles

13 were not subject to peer review. Of course, that only matters if there are actual peers to review

14 them, and a process for that review. Defendant elected to offer no insights into those dispositive

15 questions, instead rely upon inference and assumption. Neither should be the foundation for

16 exclusion.

17 Defendant's final attack on Mr. Harrington attempts to elevate a vaguely presumed bias

18 into a *Daubert*-level reliability analysis. Bias arguments go to the weight of the testimony, not

19 its admissibility. And Defendant offers no authority to support excluding a witness because of

20 bias, real or false. Furthermore, the merits of Defendant's bias argument are severely undercut

21 by Mr. Harrington's testimony.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 The “test of reliability is flexible and Daubert’s list of specific factors neither necessarily
 3 nor exclusively applies to all experts or in every case”. *Primiano* 598 F.3d. at 564. Mr.
 4 Harrington is very qualified to render opinions and inform the trier of fact. The irony of
 5 Defendant’s flimsy attempt to exclude Mr. Harrington, is that the expert Defendant utilizes in
 6 this motion, Mr. Kass, is very likely Mr. Harrington’s pupil.

7 Defendant’s request to exclude Mr. Harrington’s evidence should be denied.

8 **D. Phil Waier’s Testimony is Admissible.**

9 Defendant completely misconstrues the thrust of Mr. Waier’s declaration, and the case
 10 law regarding damage calculations. In *Comcast Corp v Behrend*, 133 S.Ct. 1426, 1433 (2013)
 11 the Supreme Court held that damages must be “capable of measurement on a classwide basis”
 12 Defendant primary contention for exclusion of Mr. Waier is that he has not calculated classwide
 13 damages. That is not the requirement. Mr. Waier has demonstrated, using the identical damage
 14 calculation methodology accepted in numerous class cases, how the damages can be measured.

15 The damages calculation here is as simple as the product at issue. This is not a complex
 16 anti-trust case, nor even a moderately complicated wage and hour case. This case is about
 17 flooring. Only three elements—the material, the labor cost to remove, and the labor cost to
 18 replace, make up potential damages relating to the cost of replacement

19 Mr. Waier testified as follows when asked about his methodology:

20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 In the forgoing exchange, repeated multiple times in Mr. Waier deposition, he provides
3 the mechanism for damage calculation. It is simple. [REDACTED]

4 [REDACTED]
5 He further explains:
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Mr Waier provides in his declaration, and supported by his testimony a clear roadmap to
24 how a classwide damage methodology would be employed. [REDACTED]

25 [REDACTED]
26 [REDACTED] It is a simple calculation that results in a per square foot or per board
27 damages for every class member.

28 Mr. Waier has qualified to testify before numerous courts using the precise damage

1 methodologies set forth in his declaration and testimony. In an unpublished opinion, the Third
 2 District Court of Appeal for California accepted without question Mr. Waier's classwide damage
 3 model, and his trial testimony articulating the classwide damages for a roofing class action.
 4 (Exh. 36, *McAdams v Monier* (Dist. Ct. 2015) WL 5968461). Defendant's motion to exclude
 5 should be denied.

6 III. CONCLUSION

7 Based on the foregoing, Defendants' Motion to Strike Testimony of Plaintiffs' Expert
 8 Witnesses should be denied.

9
 10 Dated: April 28, 2017

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